Wong Sew Yun & Ors v Chelingga ak Asuh @ Asu (f)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–1054 OF 2008
SULAIMAN DAUD, APANDI ALI AND MOHTARUDIN BAKI JJCA
31 MAY 2011

Native Law and Custom — Land dispute — Transfer — Invalidity and illegality — Status of land, whether native customary land — Whether land mixed land — Whether registered land owner can be deprived without right to be heard

This was an appeal concerning a piece of land ('the said land'). In the High Court, the plaintiff sought for a declaration that the transfer of the said land to the first, second, third, fourth and fifth defendants was illegal and invalid and that the first defendant had no license to lend monies and the said loan to the plaintiff was illegal and unenforceable. The plaintiff also, inter alia, sought a rectification order that the registry book of the said land in the relevant land registry be rectified by the sixth defendant in favor of the plaintiff or her nominees, along with damages and costs. The plaintiff's claim was allowed in part where the transfer of the said to the first defendant was illegal and invalid; the subsequent transfer of the said property to the second, third, fourth and fifth defendants was illegal and invalid and directed to the Registrar of Lands and Survey Sarikei Sarawak to make necessary amendment to the registry book and by putting the plaintiff's name as owner of the said land. The learned trial judge held that the said land was a native customary land and its title was issued under s 18 of the Sarawak Land Code ('SLC'). It was further held that since the defendants were all non-native, the first transfer to the first defendant and other transfers were illegal and invalid. The defendant contended that the land cannot be converted into native customary land or native area as it was a 'mixed land'. It was also pleaded in the defendants' statement of claim that the said land was registered under one Nguang Aik (Sarawak) Sdn Bhd which was not a party to the action. Before the court, the issues were the actual status of the said land; whether the land was a mixed zone and whether an order can be made to deprive the registered land owner (Nguang Aik (Sarawak) Sdn Bhd) of his land without giving him the right to be heard.

Held, allowing the appeal with costs fixed at RM5,000:

(1) The issuance of the title under s 18 of the SLC did not mean it was a native area land. The land title would show whether or not it was a native area land. If it was a native area land, the restrictions and special conditions of the land title on the front page would clearly say so or the category of the land on the back page of the land title next to the diagram

of the land would be stated 'Category: Native Area Land by virtue of Section 2 of the Land Code or gazette as Native Area Land by Sarawak Government Gazette notification. Country Land'. However, the land title clearly did not have such annotations on the front or back pages. The said land could therefore be charged and sold to non-natives (see paras 7(c) & 8).

(2) The said land was neither native area land nor a native customary land. Since the basis of declaring the transfers to be illegal and invalid on the main issue that it was prohibited by the Sarawak Land Code to transfers native area land or native customary land to a non-native, the said orders of the learned trial judge was contrary to the findings of fact of the Court of Appeal. In the present appeal, the court found that the said land being a mixed zone land, could be legally transferred to any non-native (see para 8).

(3) There was a serious misdirection in the orders of the learned trial judge for failing to see prior to the commencement of the trial, the said land was registered in the name of a person who was not a party to the proceedings or trial. The orders were inappropriate as no notice or opportunity was given to this person for his right to be heard. The registered owner, Nguang Aik (Sarawak) Sdn Bhd could not be deprived of his property without a hearing, as enshrined in arts 8 and 13 of the Federal Constitution (see para 10).

[Bahasa Malaysia summary

Ini adalah rayuan berkaitan sebidang tanah ('tanah tersebut'). Di Mahkamah Tinggi, plaintif memohon untuk perisytiharan bahawa pemindahan tanah tersebut kepada defendan-defendan pertama, kedua, ketiga, keempat dan kelima adalah tidak sah dan terbatal dan bahawa defendan pertama tidak mempunyai lesen untuk meminjamkan wang dan pinjaman tersebut kepada plaintif adalah tidak sah dan tidak boleh dikuatkuasakan. Plaintif juga, antara lain, memohon perintah pembetulan bahawa buku pendaftaran tanah tersebut di dalam pendaftaran tanah yang relevan dibetulkan oleh defendan keenam memihak plaintif atau penamanya, bersama dengan ganti rugi dan kos. Tuntutan plaintif dibenarkan sebahagiannya yang mana pemindahan tanah tersebut kepada defendan pertama adalah tidak sah dan terbatal; pemindahan seterusnya hartanah tersebut kepada defendan-defendan kedua, ketiga, keempat dan kelima adalah tidak sah dan terbatal dan diarahkan kepada Pendaftar Tanah dan Ukur Sarikei Sarawak untuk membuat pindaan yang perlu kepada buku pendaftaran dan dengan meletakkan nama plaintif sebagai tuan punya tanah tersebut. Hakim perbicaraan yang bijaksana memutuskan bahawa tanah tersebut adalah tanah adat anak negeri dan hak miliknya dikeluarkan di bawah Kanun Tanah Sarawak ('KTS'). Selanjutnya diputuskan bahawa memandangkan defendan-defendan kesemuanya bukan anak negeri, pemindahan pertama kepada defendan pertama dan

pemindahan-pemindahan yang lain adalah tidak sah dan terbatal. Defendan berhujah bahawa tanah tersebut tidak boleh ditukarkan kepada tanah adat anak negeri atau kawasan anak negeri memandangkan ia adalah 'mixed land'. Ia juga diplidkan di dalam penyata tuntutan defendan-defendan bahawa tanah tersebut didaftarkan di atas nama Nguang Aik (Sarawak) Sdn Bhd yang mana bukan pihak kepada tindakan tersebut. Di hadapan mahkamah, isu-isu adalah status sebenar tanah tersebut; sama ada tanah tersebut adalah zon bercampur dan sama ada perintah boleh dibuat untuk menafikan tuan punya berdaftar tanah tersebut (Nguang Aik (Sarawak) Sdn Bhd) daripada tanahnya tanpa memberikan dia hak untuk didengar.

Diputuskan, membenarkan rayuan dengan kos yang ditetapkan pada RM5,000:

(1) Pengeluaran hak milik di bawah s 18 KTS tidak bermaksud ia adalah kawasan tanah anak negeri. Hak milik tanah akan menunjukkan sama ada atau tidak ia adalah kawasan tanah anak negeri. Jika ia adalah kawasan tanah anak negeri, sekatan-sekatan dan syarat-syarat khas hak milik tanah tersebut di muka surat hadapan akan jelas menyatakannya atau kategori tanah tersebut di muka surat belakang hak milik tanah tersebut bersebelahan gambar rajah tanah tersebut akan dinyatakan 'Category: Native Area Land by virtue of Section 2 of the Land Code or gazette as Native Area Land by Sarawak Government Gazette notification. Country Land'. Walau bagaimanapun, hak milik tanah jelas tidak mempunyai anotasi sedemikian di bahagian depan atau belakang muka surat-muka surat. Tanah tersebut oleh itu boleh dicaj dan dijual kepada bukan anak negeri (lihat perenggan 7(c) & 8).

(2) Tanah tersebut bukan kawasan tanah anak negeri atau tanah adat anak negeri. Memandangkan asas untuk mengisytiharkan pemindahan-pemindahan tersebut adalah tidak sah dan terbatal atas isu yang utama bahawa ia dilarang oleh KTS untuk memindahkan kawasan tanah anak negeri atau tanah adat anak negeri kepada bukan anak negeri, perintah-perintah hakim perbicaraan yang bijaksana tersebut adalah bertentangan dengan dapatan-dapatan fakta Mahkamah Rayuan. Dalam rayuan ini, mahkamah mendapati bahawa tanah tersebut sebagai tanah zon bercampur, boleh secara sah dipindahkan kepada mana-mana bukan anak negeri (lihat perenggan 8).

(3) Terdapat salah arah serius dalam perintah-perintah hakim perbicaraan yang bijaksana kerana gagal untuk menguruskan sebelum permulaan perbicaraan, tanah tersebut didaftarkan di dalam nama orang yang bukan pihak kepada prosiding atau perbicaraan. Perintah-perintah tidak sesuai memandangkan tidak terdapat notis atau peluang yang diberikan kepada orang ini untuk haknya untuk didengar. Tuan punya berdaftar, Nguang Aik (Sarawak) Sdn Bhd tidak boleh dinafikan dengan hartanahnya tanpa

perbicaraan, seperti yang disemadikan di dalam perkara-perkara 8 dan 13 Perlembagaan Persekutuan (lihat perenggan 10).]

Cases referred to

Tan Ying Yong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (refd)

Legislation referred to

Federal Constitution arts 8, 13
Sarawak Land Code (Cap 81) ss 8, 18

Appeal from: Suit No 21–3 of 2004 (High Court, Sibu)

George Lim (Battenberg & Talma) for the appellant.
Baru Bian (Siah Sy Jen with him) (Baru Bian) for the respondent.

Apandi Ali JCA:

INTRODUCTION

[1] In this appeal we shall refer to the appellants and the respondent as the defendant and the plaintiff respectively as they were at the High Court. The plaintiff had filed a writ of summons and statement of claim and seeks the followings orders and relief:

(a) a declaration that the transfer of the said land to the first defendant vide Instrument No L 1993/1989 was illegal and invalid;

(b) a declaration that the transfer of the said land from the first defendant to the second, third, fourth and fifth defendants vide Instrument No L 3129 of 1992 was illegal and invalid;

(c) a declaration that the first defendant has no licence to lend monies and the said loan to the plaintiff was illegal and unenforceable in law;

(d) for a rectification order that the registry book on the said land in the relevant land registry be rectified by the sixth defendant in favour of the plaintiff or her nominee/s;

(e) such other orders or reliefs that this honourable court deems fit and just;

(f) damages to be assessed; and

(g) costs.

[2] The action was filed on 6 February 2004; and it was premised on the allegation that the transfer of land described as Lot 1572 Block 201, Sarikei Land District ('the said land') was illegal, unlawful and fraudulent.

[3] Before the commencement of the trial on 5 August 2004, the plaintiff

discontinued her action against the sixth defendant. The trial proceeded, without any amendment to the pleadings, by way of witness statements with preliminary cross-examination witness statement and preliminary re-examination, with liberty for further oral cross-examination and re-examination.

[4] At the end of the trial on 30 July 2008 the learned trial judge allowed the plaintiffs claim in part, which in essence declared that the transfer of the said land to the first defendant was illegal and invalid; the subsequent transfer of the said property to the second, third, fourth and fifth defendants was illegal and invalid and directed the Registrar of Lands and Survey Sarikei Sarawak to make the necessary amendment in the registry book to give effect to the judgment by putting the plaintiffs name as owner of the said land.

[5] The defendants being not satisfied with the said judgment appealed to this court. We allowed the appeal and set aside the orders made by the High Court. We now give our reasons for doing so.

ISSUES TO BE DETERMINED

[6] Upon perusal of the appeal records and after hearing submissions of both parties, we identified the followings issues that had became the bones of contention in this appeal:

(a) what is the actual status of the said land? The learned trial judge held that the said land was a native customary land and title was issued under s 18 of the Sarawak Land Code. As the defendants were all non-native, the learned trial judge held that the first transfer to the first defendant and subsequent transfers were illegal and invalid, as they contravened s 8 of the Sarawak Land Code;

(b) the defendants contended that the said land is a 'mixed zone' land and corollary to that: such land cannot be converted into native customary land or native area land; and

(c) before the commencement of the trial, the said land is registered under one Nguang Aik (Sarawak) Sdn Bhd. This fact was pleaded by the defendants in para 8(a) of their statement of defence. This Nguang Aik (Sarawak) Sdn Bhd is not a party to the action in the High Court. The issue is therefore; can an order be made to deprive this registered land owner of his land without giving him the right to be heard?

OUR FINDINGS AND DECISION

[7] Upon perusal of the appeal records, we made the followings findings:

(a) the said land was first issued with a title by the land registry office on 18 August 1967 (see p 155 of the appeal records);

(b) prior to the issue of the above-said title, the said property is in an areas classified as 'mixed zone land' and this classification was made vide Gazette Notification GN 27/11 of 3 January 1949 (see copy of *gazette* at pp 121–123 of the appeal records. Furthermore, the Superintendent of the Land and Survey Department, Sarikei Division of Sarawak, Mohamad Razali bin Arshad, in his witness statement (by way of affidavit) avers as follows:

> 3. The land title of a parcel of land is Sarikei, namely, Lot 1572 Block 201 Sarikei Land District (hereinafter called 'the said land') is shown to me and annexed as pages 5–7 of the Bundle of documents of the 1st–5th Defendants. I confirm that nowhere does the said land title show that the said land is native land. This means that the said land can be charged to non-natives and non-natives are able to buy the said land and have the said land title registered in their name.
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> 4. I also confirm that the said land is classified as Mixed Zone Land. A print out of title of the said land is shown to me and annexed as pages 8–9 of the Bundle of Documents of the 1st – 5th Defendants. I confirm that the said print out of title was issue by the Land and Survey Department, Sarikei Division. The said print out of title clearly shows that the said land is classified as Mixed Zone Land.
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> 5. A photocopy of the plan of the area that the said land is situate in is shown to me and annexed as Exhibit 'WHS-1' in the 5th Defendant's Witness Statement By Way of Affidavit affirmed on 10th March, 2008. The said plan was printed by the Land and Survey department, Sarikei Division on 6th March, 2008 (see bottom left hand corner of the said plan). The said plan shows that the said land was gazetted as Mixed Zone Land vide GN 27/11 of 3.1.1949. The said plan also clearly shows that the said area is in an area classified as Mixed Zone Land and not in the area classified as Native Area Land which is to the south of the plan beyond the boundary line dividing Mixed Zone Land and Native Area Land.
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> 6. Upon further search, I found the gazette vide GN 27/11 of 3.1.1949. Annexed hereto and marked as exhibit 'MRA-1' is a photocopy of the said Gazette. This means that the said land was classified as Mixed Zone Land even before the said land title was issued in 1967 (page 5 of the Bundle of Documents of the 1st–5th Defendants).

(c) That the issuance of title under s 18 of the Sarawak Land Code does not mean that it is a native area land. This can be seen in the explanation given by the Assistant Registrar of the Land and Survey Department, Sarikei Division, Kong Tong Kiong in his witness statement (by way of affidavit), which reads as follows:

> 3. I confirm that a parcel of land in Sarikei, namely, Lot 1572 Block 201 Sarikei Land District (hereinafter called 'the said Land') is classified as Mixed Zone Land. A print out of title of the said Land is shown to

me and annexed as pages 8–9 of the Bundle of Documents of the 1st–5th Defendants. I confirm that the said print out of title was issued by the Land and Survey Department, Sarikei Division. The said print out of title clearly shows that the said Land is classified as Mixed Zone Land.

4. The land title of the said Land is shown to me and annexed as pages 5–7 of the Bundle of Documents of the 1st – 5th Defendants. The said land title was issued pursuant to s 18 of the Land Code. This means that it was deemed to be grant in perpetuity of that land by Land Code (Amendment) Ordinance, 1974 (see page 6 of the Bundle of Documents of the 1st–5th Defendants) issued to a native proprietor free of premium, quit rent and other charges for as long as such native proprietor holds it or the land is transferred to the transferee in the line of inheritance. By itself, the issuance of the land title pursuant to s 18 of the Land Code does not mean that the said land is native area land. the land title would show whether or not it is a native area land. If it is a Native Area Land, the Restrictions and Special Conditions of the land title on the front page would clearly say so or the category of the land on the back page of the land title next to the diagram of the land would state as follows: 'Category: Native Area Land by virtue of s 2 of the Land Code or gazetted as Native Area Land by Sarawak Government Gazette notification. Country Land'. The said land title clearly does not have any such annotations thereon on the front or back pages. The said Land can therefore be:

(a) charged to non-native and it was charged to non-natives twice in 1980 and both charges were later discharged in 1980 and 1984 respectively (see p 6 of the Bundle of Documents of the 1st–5th Defendants); and

(b) sold to non-natives and the said land title can be registered in their name. When the said Land was transferred to the 1st Defendant, the s 18 clause was cancelled (see item (i) of the Restrictions and Special Conditions on page 5 of the Bundle of Documents of the 1st - 5th Defendants) and the new registered proprietor had to pay quit rent under s 18(3) of the Land Code (see page 6 of the Bundle of Documents of the 1st -5th Defendants).

I confirm that there are many parcels of land in Sarikei and throughout the whole of Sarawak which are like the said Land, the land titles of which were issued pursuant to s 18 of the Land Code. I confirm that that in itself does not mean that such lands are native area land. I estimate that the Land and Survey Department, Sarikei Division, has about 10,000 such titles.

A land title is issued under s 18 of the Land Code to natives who had been using certain land and had claimed native customary rights over such land but those rights are extinguished upon the issuance of the land itle. It is possible to claim native customary

rights within Mixed Zone Land and also within native area land. This means that it is possible to have land titles issued under s 18 of the Land Code for both Mixed Zone Land and native area land, so just because a land title is issued under s 18 of the Land Code does not make that land title native area land. It depends on whether the land in the first place is classified and gazetted as native area land. I confirm that the said Land is within the area which is classified as Mixed Zone Land and the issuance of the land title under s 18 of the Land Code does not change its classification from Mixed Zone Land to native area land.

(d) That there was no re-classification of the said property since the *gazette* of 1949, and thus it remained a mixed zone land. This is evidenced in the witness statement (also by way of affidavit) of Yik Poh Chung, the senior Draughtsman of the Land and Survey Department, Sarikei division, which reads as follows:

I confirm that a parcel of land in Sarikei, namely, Lot 1572 Block 201 Sarikei Land District ('the said land') is classified as Mixed Zone Land. A photocopy of the plan of the area that the said land is situate in is shown to me and annexed as Exhibit 'WSH-1' in the 5th Defendant's witness statement by way of affidavit affirmed on 10th March, 2008. The said plan was printed by the Land and Survey Department, Sarikei Division on 6th March, 2008 (see bottom left hand corner of the said plan). The said plan shows that the said land was gazetted as Mixed Zone Land vide GN 27/11 of 3 January 1949. The said plan also clearly shows that the said land is in an area classified as Mixed Land and not in the area classified as native area land which is to the south of the plan beyond the boundary line dividing Mixed Zone Land and Native Area Land.

A photocopy of the said Gazette vide GN. 27/11 of 3.1.1949 is shown to me and annexed as Exhibit 'MRA-1' in MOHAMAD RAZALI BIN ARSHAD's witness statement by way of affidavit affirmed on 6 May 2008. This means that the said land was classified as Mixed Zone Land in 1949 whereas the said land title was issued in 1967 (see p 5 of the bundle of documents of the 1st - 5th defendants). So by the time that the said land title was issued, the said land was already classified as Mixed Zone Land and as such, the said land title is not Native Area Land.

The third page of the said Exhibit 'MRA-1', namely, p 15 of the said Gazette, has a sub-heading, 'THIRD DIVISION', and under that are the words 'All those blocks of lands shown bordered in blue on a plan lodged in the office of the Superintendent of Lands and Surveys, Third Division, as Miscellaneous Plan No F3/5-30 numbered 1 to 13'. Under that sub–heading and those words is No 11 which refers to a large tract of land. The description of this large tract of land in No11 is by mean and bound following the direction and description given in the said Gazette. This means that we are able to draw a line through the lands to form the border/boundary that is drawn in pink on the said Miscellaneous Plan, a photocopy of which is annexed hereto as

Exhibit 'YPC-1' so that all the lands enclosed within such border/boundary would be classified as Mixed Zone Land. For the avoidance of doubt, in 1949 at the time of the said Gazette, Sarikei lands were under Third Division.

I am able to tell from the said Miscellaneous Plan that the said Land is within the Mixed Zone Land stated in the said Gazette and I have marked it as 'X' in pink on the said Miscellaneous Plan annexed hereto as Exhibit 'YPC-1'. I confirm that third exhibit is only a portion of the large tract of land described in No 11 of the said Gazette. I only produce the portion which is relevant to the said land as the entire Miscellaneous Plan is too big to produce to the court as it includes lands up to Kapit.

When a parcel of land such as the said land is classified as Mixed Zone Land, the land title which is issued thereafter cannot be classified or categorized as Native Area Land unless there is a further Gazette that says so. In our records, there is no such record that the said Land was re-classified as Native Area Land. So the said land remains as Mixed Land.

The witness also tendered the land classification map, showing the mixed zone areas that was referred to the 1949 *gazette* (see p 126 of the appeal records).

(e) Under the peculiar land laws of Sarawak, namely the Land Classification Ordinance 1948, land in Sarawak were classified into five categories, namely:

(i) mixed zone land;

(ii) native area land;

(iii) native customary land;

(iv) reserved land; and

(v) interior land.

Despite the enactment of the Sarawak Land Code in 1958, the classification of the five categories remained unaffected.

(f) The said land was inherited by the plaintiff and transferred into her name on 25 January1988 and transferred to the first defendant, second, third, fourth and fifth defendants in November 1992.

(g) That it is in evidence that the said land was transferred to one Nguong Aik (Sarawak) Sdn Bhd on 16 February 2004 (see the memorandum of transfer at pp 153–154 of the appeal records) and that the said land was charged to Hong Leong Bank Berhad on 18 May 2005.

(h) The actual trial of this action commenced at the High Court on 19 January 2008 and concluded on 30 July2008.

[8] From the above findings, it is our judgment that the said land is neither a native area land nor a native customary land. Since the basis of declaring the

transfers of the said land to the first defendant and later to the second, third, fourth and fifth defendants to be illegal and invalid, on the main issue that it is prohibited by the Sarawak Land Code to transfer a native area land or native customary land to a non-native, we conclude that the said orders of the learned trial judge was contrary to our findings of fact. It is our judgment that the said land, being a mixed zone land, can be legally transferred to any non-native.

[9] It must be emphasised that we made our findings based on the unchallenged evidence of the defendants' witness statements, as quoted above. The only half-hearted challenge is on the issue of mixed zone land to be an encumbrance on the land. This to our mind is a misconception as the term 'mixed zone land' cannot be an encumbrance. Such term falls under 'categories' of land. In law, it is neither a condition nor an encumbrance. There was no further cross-examination of the witnesses on the facts that the said land remains as mixed zone land.

[10] It is also our judgment that there is a serious misdirection in the orders of the learned trial judge for failing to consider or appreciate that prior to the commencement of the trial, the said land is registered in the name of a person, who is not a party to the proceedings or trial. The orders, in such circumstances are inappropriate as no notice or opportunity was ever given to this person for his right to be heard. It is our judgment that the registered owner, Nguong Aik (Sarawak) Sdn Bhd cannot deprived of his property without a hearing. This is not only trite law but such right is enshrined in arts 8 and 13 of the Federal Constitution.

[11] A fortiori, as held by the Federal Court in *Tan Ying Yong v Tan Sian San & Ors* [2010] 2 MLJ 1, the title of a purchaser in due course, for value and without notice is indefeasible.

[12] The High Court judgment, in this case, in particular the last part, that directed the name of the plaintiff to be registered as the proprietor of the said land has put the indefeasible title of Nguong Aik (Sarawak) Sdn Bhd to unnecessary peril. The said judgment is unlawful, unenforceable and cannot be sustained.

[13] For the above reasons, we allowed the appeal by the defendants and accordingly set aside the judgment of the High Court costs was fixed at RM5,000 payable by the respondent (plaintiff) to the appellants (defendants).

Appeal allowed with costs fixed at RM5,000.

Reported by Ibnu Aswan